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BEFORE THE ARIZONA CORPORATION COMMISSION

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Arizona Corporation Commission
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IN THE MATTER OF THE APPLICATION OF ARIZONA PUBLIC SERVICE COMPANY FOR A HEARING TO DETERMINE THE FAIR VALUE OF THE UTILITY PROPERTY OF THE COMPANY FOR RATEMAKING PURPOSES, TO FIX A JUST AND REASONABLE RATE OF RETURN THEREON, TO APPROVE RATE SCHEDULES DESIGNED TO DEVELOP SUCH RETURN.	DOCKET # E-01345A-16-0036 **REPLY TO ARIZONA PUBLIC SERIVCE'S RESPONSE TO WOODWARD'S MOTION TO COMPEL**
IN THE MATTER OF FUEL AND PURCHASED POWER PROCUREMENT AUDITS FOR ARIZONA PUBLIC SERVICE COMPANY	DOCKET # E-01345A-16-0123

Warren Woodward ("Woodward"), Intervenor in the above proceeding, hereby replies to Arizona Public Service's Response to Woodward's Motion to Compel

("Response").

In its Response, Arizona Public Service ("APS") has misrepresented Woodward's Motion to Compel ("Motion"). APS has cited law which has no bearing on the issues involved in the Motion. APS has misrepresented ACC Decisions and cherry picked same for out-of-context quotes to suit APS's purpose, which is to avoid answering questions that must be answered.

APS claims that:

> Although Mr. Woodward's Motion mentions that APS had objected to some questions on the bases [sic] of being " unduly burdensome," "overly broad," and "moot" (Motion at 2), the Motion itself addresses only the issue of relevance, and so APS's Response is limited to that issue.
> (Response, p. 2, lines 7 – 10)

The technical placement of Woodward's argument in a designated attachment rather than in the body of the Motion itself should not make any difference in any legal proceeding, let alone a proceeding before the ACC. Besides, while APS *asserted* its Response "is limited" to the issue of relevance, APS's *actual* Response brought up many other issues, even one not mentioned by Woodward, that of propriety. Woodward however does not object to APS's unlimited Response since all of APS's arguments fail anyway, including the one APS stuck into the above quoted sentence via a footnote:

> APS did not actually object to any of Mr. Woodward's questions on the basis of mootness, but rather made such an observation as a matter of fact in one instance.
> (Response, p. 2. footnote 1)

In his Motion at Exhibit B, Woodward took approximately one page and a half,

single spaced, to debunk in detail APS's claim that one of Woodward's questions (2.38) was moot. Woodward is amused that APS is so arrogant as to presume that a footnote – a footnote that is essentially a unsubstantiated proclamation saying the question is moot because we said so – is a refutation. Besides, since by its own admission APS "did not actually object" to answering Woodward's data request 2.38, then APS *must* answer the question.

APS claims that Woodward's Motion is based "entirely on a misreading and misinterpretation" of Arizona Corporation Commission ("ACC") Decision # 75047. Actually it is APS that, in its Response, has spun that Decision to its own purposes by cherry picking a few Findings of Fact and failing to consider the Decision as a whole.

APS erroneously asserts that the issues referred to in Decision # 75047 Finding of Fact ("FOF") ## 16 & 17 are strictly the terms and conditions of APS proposed Service Schedule 17, and that those issues alone are what was deferred to in this pending APS rate case. (Response, p. 2, lines 21 – 25) However, a true and comprehensive reading of Decision # 75047 yields a different conclusion. Below are Decision # 75047 Findings of Fact that APS has conveniently overlooked in its argument. Taken together, it is clear that there are more issues referred to in Decision # 75047 than what APS's narrow, self-serving interpretation allows.

> 5. After the Company filed its [Service Schedule 17] application, the Commission received numerous filings in opposition to the tariff from members of the public.
> 6. Among the comments were allegations that smart meters adversely affect

> human health, that smart meters intrude upon individual privacy interests, that the costs of smart meter deployment do not outweigh the benefits, and that APS's proposed opt-out tariff rate is unreasonable.
> 16. The issues presented by APS's proposed opt-out tariff have attracted significant public attention. The comments that we have received from the public show that some individuals continue to be concerned about the various issues that may surround smart meters.
> 17. Although APS has presented its application as a tariff filing, we think that these issues would benefit from the type of comprehensive review that is conducted in a general rate case. A tariff filing proceeding, which is typically processed in a more abbreviated fashion, is ill-suited to address the issues presented herein.
> 19. We believe that our consideration of this matter will be aided by the full spectrum of information that is included in a general rate case. We will therefore stay this proceeding until APS files its next general rate case, at which time the two cases may be consolidated or processed in tandum [sic].

APS attempted to bolster its narrow interpretation of Decision # 75047 by asserting that, because APS was enjoined to perform certain tasks by the Decision, those tasks were the *only* issues to be deferred to its rate case and considered in its rate case. (Response, p 3, lines 1 – 22) But APS's assertion is just more self-serving spin. In fact, APS's to-do list at FOF # 23 outlines just *some* of the issues that the ACC must consider in this rate case. APS's to-do list at FOF # 23 is illustrative and not restrictive, and certainly *not limiting*.

APS's argument then goes farther off the rails by imagining that the ACC has already confirmed APS's tortured interpretation of Decision # 75047 by way of ACC Decision # 75752, which APS selectively quotes thus:

> However, Staff agrees with APS 's interpretation of Decision No. 75047 that directed APS to include in its next rate case the topics of AMI opt-out and the meter reading for non-standard meters.

(Decision # 75752 at 36, *not* at 9 as incorrectly cited by APS)

Below is the context of that quote, the entire FOF 36. Clearly APS is engaging in wishful thinking. If anything, FOF 36 supports Woodward's reading of Decision # 75047 which is, to borrow that Decision's language, that the "various issues that may surround smart meters" are to be considered in this rate case. Decision # 75752 FOF 36:

> 36. Staff appreciates Mr. Gayer's diligence in following the proposed changes and anticipating the impact of those changes on customers with analog meters. Staff recognizes that Mr. Gayer's proposed modifications to Service Schedule 8 are important topics that the Commission needs to evaluate and provide direction on the next step. However, Staff agrees with APS 's interpretation of Decision No. 75047 that directed APS to include in its next rate case the topics of AMI opt-out and the meter reading for non-standard meters. Therefore, Staff concludes that Mr. Gayer's concerns are best addressed in the current APS rate case Docket No. E-01345A-16-0036 rather than in this docket which seeks to modify the bill estimation tariff. Mr. Gayer could still intervene in the APS rate case if he desires to have input on these issues.

Like Decision # 75047 FOF # 23 that APS attempted to spin to APS's own end, Decision # 75752 FOF # 36 is illustrative and not restrictive, and certainly *not limiting.*

Next, in APS's argument based on 47 U.S.C Section 332(c)(7), APS takes its wishful thinking to the realm of absolute fantasy. APS wrote:

> Moreover, it is doubtful that this Commission has jurisdiction over the alleged effects of AMI that are apparently of concern to Mr. Woodward. 47 U.S.C. Section 332(c)(7) is controlling here. This provision:
>
> > preempted state and local governments from regulating the placement, construction or modification of personal wireless service facilities on the basis of the health effects of RF radiation where the facilities would operate within levels determined by the FCC to be safe.

> *Cellular Phone Taskforce v. FCC* (2nd Cir. 2000) 205 F.2d 82, 88. It is unquestioned that APS's AMI meters provide what federal law defines as "unlicensed wireless service" (47 U.S.C. 332(c) (7) (C) (iii)) pursuant to FCC approval under 47 C.F.R. Section 15.20l(b).
> (Response, p. 4, lines 3 to 12)

Clearly, telecommunications law is not APS counsel's forte. 47 U.S.C. Section 332(c)(7) is most definitely *not* "controlling here." Also, in APS's world it may well be "unquestioned that APS's AMI meters provide what federal law defines as 'unlicensed wireless service,'" but, in the real world of federal statutory definitions, "unlicensed wireless service" does *not* apply to "smart" meters at all. Here are the statutory definitions at 47 U.S.C. § 332(c)(7)(C):

> (i) **the term "personal wireless services" means** commercial mobile services, **unlicensed wireless services**, and common carrier wireless exchange access services;
> (ii) **the term "personal wireless service facilities" means facilities for the provision of personal wireless services**; and
> (iii) **the term "unlicensed wireless service" means the offering of telecommunications services** using duly authorized devices which do not require individual licenses, but does not mean the provision of direct-to-home satellite services (as defined in section 303(v) of this title).
> (emphasis added)

If "APS's AMI meters provide what federal law defines as 'unlicensed wireless service,'" and "'unlicensed wireless service' means the offering of telecommunications services," then is APS 'offering telecommunications services?' Here are the federal statutory definitions of "telecommunications" and "telecommunications services" at 47 U.S. C. § 153:

> **(50) Telecommunications**
> The term "telecommunications" means the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received.
> **(53) Telecommunications service**
> **The term "telecommunications service" means the offering of telecommunications for a fee directly to the public**, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.
> (emphasis added)

Clearly APS is *not* "offering … telecommunications for a fee directly to the public." So APS's argument that "it is doubtful that this Commission has jurisdiction over the alleged effects of AMI" is an argument based in APS fantasy, not in law.

Let there be no doubt regarding the preceding point made. The FCC has *not* claimed a broad-based preemption policy to cover all RF emission sources. From the FCC itself:

> "To date the Commission has declined to preempt on health and safety matters."
>
> "The Telecommunications Act does not preempt state or local regulations relating to RF emissions of broadcast facilities or other facilities that do not fall within the definition of "personal wireless services." It would appear from the comments that a few such regulations have been imposed, generally as a result of health and safety concerns. At this point, it does not appear that the number of instances of state and local regulation of RF emissions in non-personal wireless services situations is large enough to justify considering whether or not they should be preempted. We have traditionally been reluctant to preempt state or local regulations enacted to promote bona fide health and safety objectives. We have no reason to believe that the instances cited in the comments were motivated by anything but bona fide concerns." (Underlining in original)
>
> "At this time ... we deny the petitions ... from several parties, requesting a

broad-based preemption policy to cover all transmitting sources."

(Pages 61 & 62, In the Matter of Guidelines for Evaluating the Environmental Effects of Radiofrequency Radiation, ET Docket No. 93-62, REPORT AND ORDER, Adopted: August 1, 1996; Released: August 1, 1996. Online here: http://transition.fcc.gov/Bureaus/Engineering_Technology/Orders/1996/fcc96326.pdf)

It is worth noting that APS's bogus FCC preemption argument has been put forth unsuccessfully by other utilities. PG&E in California and CMP in Maine both tried and failed. A California Public Utilities Commission Order ruled that:

PG&E is not a telecommunications service provider providing telecommunication service. Moreover, Smart Meters are not personal wireless facilities and are not used to provide personal wireless service. (p. 8, online here: http://emfsafetynetwork.org/wp-content/uploads/2012/11/168608.pdf)

And a Maine Public Utilities Commission Order found that:

Based on the submissions of CMP and the Intervenors, there is no direct federal preemption and novel field preemption issues require a thorough legal and factual analysis. CMP's arguments do not make this showing. (page 34, here: https://mpuc-cms.maine.gov/CQM.Public.WebUI/Common/ViewDoc.aspx?DocRefId={F1020185-26AE-4733-A491-644096366CE4}&DocExt=pdf)

APS's next specious argument for dismissing Woodward's questions as irrelevant was to misrepresent the Arizona Department of Health Services "smart" meter study. APS stated:

[The ACC] commissioned the Arizona Department of Health Services (ADHS) to determine whether there were health or safety concerns with AMI. The ADHS study found that there were not ….
(Response, p. 4, lines 16 – 18)

In actual fact, what the ADHS study concluded was that "smart" meters are "not likely to harm." "Not likely to harm" means that health harm *is in fact a possibility* with a "smart" meter. As such, and contrary to APS's attempted spin on the study's findings, "health and safety concerns" regarding "smart" meters remain. As such, the health harm of APS "smart" meters is just as relevant now in this proceeding as it was in ACC Docket # E-01345A-13-0069, the Docket in which ACC Decision # 75047 was made. The health harm of "smart" meters is a relevant topic because, as stated in Decision # 75047 at FOF 16 & 17, "... some individuals continue to be concerned about the various issues that may surround smart meters. [And] … we think that these issues would benefit from the type of comprehensive review that is conducted in a general rate case."

APS also argued that:

> The ADHS study … "confirmed that the meters were operating within the FCC standard." The Commission's limited review of AMI to confirm that AMI operates within the FCC standard is consistent with the FCC's jurisdiction over the safety of wireless service facilities.
> (Response, p. 4, lines 18 – 21)

First of all, "the FCC's jurisdiction over the safety of wireless service facilities" was proved previously in this Reply to be nonexistent in the way APS intended, which was as a preemption. Secondly, *there is no "FCC standard."* While the FCC has established *guidelines* for protection against the thermal effects of radio frequency exposure, those guidelines are not safety *standards*. That is acknowledged in an FCC document entitled, *Consumer Guide, Wireless Devices and Health Concerns*, the very

first line of which states that "... there is no federally developed national standard for safe levels of exposure to radiofrequency (RF) energy..." (Exhibit A). So APS's FCC argument is irrelevant.

APS then complains that "the Company's pending rate case is not the proper venue" to discuss the "smart" meter health harm issue (Response, p. 4, lines 21 – 26). APS also complains that:

> ... including the health effects of AMI in this rate case would unduly expand the scope of this proceeding. This proceeding is fundamentally about the value of APS's property devoted to public service, the costs APS incurs to provide that public service, and how those costs are collected from customers.
> (Response, p. 5, lines 1 – 4)

Actually, "this proceeding is fundamentally about" whether what APS wants is just and reasonable.

> A.R.S. § 40-361.A
> Charges demanded or received by a public service corporation for any commodity or service shall be just and reasonable. Every unjust or unreasonable charge demanded or received is prohibited and unlawful.

When APS asks for a fee from customers who wish to avoid the harm or threat of harm posed by APS's "smart" meters, then *any issues* that may cause that harm are a rate case topic. In addition to A.R.S. § 40-361.A, ACC Decision # 75047 also ensures the propriety of those issues being a topic in this particular rate case. APS's complaint then, regarding 'unduly expanding this proceeding' by including those issues in the rate case, is moot. If APS did not like ACC Decision # 75047, then APS could have appealed ACC

Decision # 75047 but it did not. For APS to complain now about that Decision's rate case ramifications is nothing more than sour grapes.

In conclusion, and for all the reasons detailed above and previously in Woodward's Motion to Compel, which includes Exhibit B, APS must be compelled to fully answer *all* the questions Woodward outlined in Exhibit B of his Motion to Compel.

RESPECTFULLY SUBMITTED this 3rd day of January, 2017.

By

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Original and 13 copies of the foregoing hand delivered on this 3rd day of January, 2017 to:

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Service List

EXHIBIT A

Wireless Devices and Health Concerns

Current Exposure Limits

While there is no federally developed national standard for safe levels of exposure to radiofrequency (RF) energy, many federal agencies have addressed this important issue. In addition to the Federal Communications Commission, federal health and safety agencies such as the Environmental Protection Agency (EPA), the Food and Drug Administration (FDA), the National Institute for Occupational Safety and Health (NIOSH) and the Occupational Safety and Health Administration (OSHA) have been actively involved in monitoring and investigating issues related to RF exposure. For example, the FDA has issued guidelines for safe RF emission levels from microwave ovens, and it continues to monitor exposure issues related to the use of certain RF devices such as cellular telephones. NIOSH conducts investigations and health hazard assessments related to occupational RF exposure.

Federal, state and local government agencies and other organizations have generally relied on RF exposure standards developed by expert non-government organizations such as the Institute of Electrical and Electronics Engineers (IEEE) and the National Council on Radiation Protection and Measurements (NCRP). Since 1996, the FCC has required that all wireless communications devices sold in the United States meet its minimum guidelines for safe human exposure to radiofrequency (RF) energy. The FCC's guidelines and rules regarding RF exposure are based upon standards developed by IEEE and NCRP and input from other federal agencies, such as those listed above. These guidelines specify exposure limits for hand-held wireless devices in terms of the Specific Absorption Rate (SAR). The SAR is a measure of the rate that RF energy is absorbed by the body. For exposure to RF energy from wireless devices, the allowable FCC SAR limit is 1.6 watts per kilogram (W/kg), as averaged over one gram of tissue.

All wireless devices sold in the US go through a formal FCC approval process to ensure that they do not exceed the maximum allowable SAR level when operating at the device's highest possible power level. If the FCC learns that a device does not confirm with the test report upon which FCC approval is based – in essence, if the device in stores is not the device the FCC approved – the FCC can withdraw its approval and pursue enforcement action against the appropriate party.

Recent Developments

Several US government agencies and international organizations work cooperatively to monitor research on the health effects of RF exposure. According to the FDA and the World Health Organization (WHO), among other organizations, to date, the weight of scientific evidence has not effectively linked exposure to radio frequency energy from mobile devices with any known health problems.

The FDA maintains a website on RF issues at www.fda.gov/Radiation-EmittingProducts/RadiationEmittingProductsandProcedures/HomeBusinessandEntertainment/CellPhones/default.htm. The World Health Organization (WHO), which has established an International Electromagnetic Fields Project (IEFP) to provide information on health risks, establish research needs and support efforts to harmonize RF exposure standards, provides additional information on RF exposure and mobile phone use at www.who.int/mediacentre/factsheets/fs193/en/index.html. For more information on the IEFP, go to www.who.int/peh-emf/en.

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